

**MARRIED OUT AND EXCLUDED ACCRUAL?  
YOU OR YOUR ESTATE CAN NOW FACE OR  
CLAIM A REDISTRIBUTION OF ASSETS ON  
DEATH OR DIVORCE**

**WHY?**

**HOW?**

**WHAT?**



**CATTO | NEETHLING | WIID**  
A FAMILY LAW PRACTICE

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## A BRIEF HISTORY

- Marital power
- 1984
- The Matrimonial Property Act
  - - Accrual
  - Without Accrual
- The Divorce Act
  - Section 7(3)

## SECTION 7(3) OF THE DIVORCE ACT

- “7(3) A court granting a decree of divorce in respect of a marriage out of community of property—
- (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded” ...
  - “(c) ...may, subject to the provisions of subsection (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.
  - (3A) A court granting a decree of divorce in respect of a Muslim marriage, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.

- (4) An order under subsection (3) of (3A) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.
- (5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) or (3A) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account—
- (a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3)(b) of this section may have in terms of section 22(7) of the Black Administration Act, 1927 (Act 38 of 1927);
  - (aA) any contract or agreement between the parties in a Muslim marriage, where the husband is a spouse in more than one Muslim marriage;
  - (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

- (c) any order which the court grants under section this Act or under any other law which affects the patrimonial position of the parties; and
- (d) any other factor which should in the opinion of the court be taken into account.”

## CONSTITUTIONAL CHALLENGES

- Mrs B
- Mrs G
- Constitutional Court

“4. Pending any remedial legislation as contemplated in paragraph 3 above, and pursuant to this Court’s conclusions in the present case and in Case CCT 158/22 KG v Minister of Home Affairs and Others, which has been decided simultaneously with the present case, the Matrimonial Property Act 88 of 1984 is to be read as including, as section 36A, the following provision:

“(1) Where a marriage out of community of property as contemplated in paragraphs (a), (b) or (c) of subsection 7(3) of the Divorce Act, 1979 (Act 70 of 1979) is dissolved by the death of a party to the marriage, a court may, subject mutatis mutandis to the provisions of subsections 7(4), (5) and (6) of the said Divorce Act, and on application by a surviving party to the marriage or by the executor of the estate of a deceased spouse to the marriage as the case may be (hereinafter referred to as the claimant), and in the absence of agreement between the claimant and the other spouse or the executor of the deceased estate of the other spouse (hereinafter referred to as the respondent), order that such assets, or such part of the assets, of the respondent as the court may deem just, be transferred to the claimant.

(2) For purposes of subsection (1), paragraph (a) of subsection 7(3) is to be read as excluding the following words: ‘before the commencement of the Matrimonial Property Act, 1984’.”



- “4. Pending any remedial legislation as contemplated in paragraph 3 above, paragraph (a) of subsection 7(3) of the Divorce Act is to be read as excluding the words in strike-out text below:

“(a) ~~entered into before the commencement of the Matrimonial Property Act, 1984,~~ in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;”

5. The order in paragraph 4 above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to a marriage concluded on or after 1 November 1984.”

# CONSTERNATION AND CELEBRATION



## HOW IS IT APPLIED?

- Court
- Executor
- On application
- **Steps:**

1. consider whether the spouse claiming a redistribution has made a contribution to the maintenance or increase in the other spouse's assets;
2. consider whether it is fair to do so;
3. only if the answer is yes to the above two considerations, look at the factors in section 7(5).
  - “(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3)(b) of this section may have in terms of section 22(7) of the Black Administration Act, 1927 (Act 38 of 1927);
  - (aA) any contract or agreement between the parties in a Muslim marriage, where the husband is a spouse in more than one Muslim marriage;
  - (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable, in terms of the antenuptial contract concerned;



- “(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3)(b) of this section may have in terms of section 22(7) of the Black Administration Act, 1927 (Act 38 of 1927);
- (aA) any contract or agreement between the parties in a Muslim marriage, where the husband is a spouse in more than one Muslim marriage;
- (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
- (c) any order which the court grants under section this Act or under any other law which affects the patrimonial position of the parties; and
- (e) any other factor which should in the opinion of the court be taken into account.”

## OLD CASES vs NEW CASES



## WHAT IT IS AND WHAT IT ISN'T?

*"The overriding aim of S7(3) is to equitably address the plight of the stay-at-home spouse after divorce and to prevent gender inequality." (Kretschmer)*

*"There can be no doubt that the defendant, for close on 20 years, made innumerable contributions to the growth of the plaintiff's estate. She gave him her wages; she rendered services in his business and in his home; she made do with far less than she was entitled to by way of domestic help, creature comforts, entertainment, social intercourse and all the elements necessary to live with reasonable human dignity. In his pursuit of money, he totally ignored her right to pursue happiness. She contributed directly, indirectly, continuously and capably, to the maintenance and increase of his estate. That contribution was very substantial indeed. The plaintiff had a secretary and general assistant in his business, a mistress, a housemaid, a cook, a seamstress, a scullery maid, a laundress, a nanny, a governess, a general domestic manager and a messenger. She worked for well over ten hours per day, seven days per week, 52 weeks a year. He paid her nothing. Her emoluments were clothing, board and lodging.*

*The extent, duration and nature of the contribution were extensive. That contribution played a significant role in enabling the plaintiff to advance over 20 years from penury to substantial wealth." (Beaumont)*



## WHAT IT IS

- Direct contributions
- Indirect contributions
- Some contributions can be globular
- Can be set-off

## OTHER CONSIDERATIONS

- “The mere fact that defendant is a rich man or that there is a disparity between the estate of the two spouses, does not create authority to tag on additional amounts to what was “contributed”.” (Kretschmer)
- Evidence enabling a court [or an executor] to put a monetary value on services is not a prerequisite
- It is not necessary where there is an antenuptial contract excluding accrual to prove extraordinary circumstances.
- In some instances an antenuptial contract excluding accrual “*may to some extent remain relevant*”.
- *Mala fide* dissipation of assets, a deliberate delay in finalisation and the date on which contributions ceased can all be factored in by the court [or Executor] in exercising its discretion.
- Clean break and section 7(2)

# TRUSTS

- Piercing / busting
- Badenhorst

## CONCLUSION

What we can say with certainty is that any recent changes to our law will have a great impact on divorces and the administration of estates.

What we can say with a lot less certainty is precisely how the newly introduced discretion will be applied. Firstly, because discretion, by its very nature, is unpredictable and secondly, because of the lack of precedent in modern constitutional South Africa as to how such discretion should be applied and exercised.

We hope that the powers that be, being the judiciary and estate executors, will exercise their discretion fairly and equitably in order to dispel the inequities which the Constitutional Court has sought to prevent.